

To Senate Judiciary Committee
From Rick Jore, Ronan MT
Representing himself, his family, and MT Pro-Life Coalition

Regarding SB 406
February 19, 2009

Members of the Senate Judiciary Committee,

Thank you for your attention and consideration of SB 406. As a board member of MT Pro-Life Coalition, I rise to strongly support this bill and express my sincere gratitude to Sen. McGee for sponsoring it.

When issuing the majority opinion in *Roe V. Wade* in 1973, Justice Harry Blackmun said "[If the] suggestion of personhood [for the unborn] is established, the [abortion rights] case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the [14th] Amendment."

By defining "person" in the MT Constitution as "a human being at all stages of human development of life, including the state of fertilization or conception, regardless of age, health, level of functioning, or condition of dependency," SB 406, if submitted to and passed by the voters of Montana, would grant to unborn children protection under the "due process" clause in Art. II Sec. 17 of the Montana Constitution.

Obviously, then, SB 406 directly challenges the central holding of *Roe V. Wade* which, of course, did not hold that an unborn child is a person.

I submit to you that SB 406 not only challenges *Roe V. Wade* as being wrongly decided, but it also challenges the notion that *Roe V. Wade* is the "law of the land," as it often is called. Too often our state legislatures have conceded authority to the federal government, especially the federal courts, that it simply does not have insofar as granted by the US Constitution. Because of time limitations, I have simply attached to my written testimony information regarding the misunderstanding (in my view and in the view of Thomas Jefferson) of what has become known as "Judicial Review" that has morphed into a *de facto* "judicial supremacy." I will do my best to answer any questions from the Committee regarding that position.

In anticipation of arguments against SB 406, please let me say with all sincerity, and I am confident that I speak for every supporter of the bill who is here today, that we do not view pregnant women as "second class citizens" nor do we desire to be uncompassionate to those who may have "unwanted", "unplanned", or "troubled" pregnancies. However, with equal sincerity, I must say that the status of "equal class citizen" and equal compassion must be afforded unborn, innocent children.

Last week, during the hearing on SB 46, Sen. McGee mentioned the *Dred Scott* decision handed down by the US Supreme Court in 1857 and which declared that slaves were "chattel" or private property. I think we would all agree that viewed through the mist of history, that had a state legislature been courageous enough to initiate an amendment to their state constitution directly challenging the *Dred Scott* decision, it would be viewed with extreme favor in our day. I submit that by passing SB 406, history will view this legislature in the same favorable light.

Jefferson on Politics & Government

18. Judicial Review

Who should make the final decision on interpreting the Constitution? The Supreme Court in the case of *Marbury v. Madison*, which was decided during the first term of President Thomas Jefferson, determined that IT should make the final decision for all branches of government, and that opinion has remained in force ever since. Jefferson, however, strongly opposed Judicial Review because he thought it violated the principle of separation of powers. He proposed that each branch of government decide constitutional questions for itself, only being responsible for their decisions to the voters.

"The question whether the judges are invested with exclusive authority to decide on the constitutionality of a law has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the Constitution which has given that power to them more than to the Executive or Legislative branches." --Thomas Jefferson to W. H. Torrance, 1815. ME 14:303

Judicial Despotism

"The Constitution... meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch." --Thomas Jefferson to Abigail Adams, 1804. ME 11:51

"To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps. Their maxim is *boni judicis est ampliare jurisdictionem* [good justice is broad jurisdiction], and their power the more dangerous as they are in office for life and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves." --Thomas Jefferson to William C. Jarvis, 1820. ME 15:277

"In denying the right [the Supreme Court usurps] of exclusively explaining the Constitution, I go further than [others] do, if I understand rightly [this] quotation from the *Federalist* of an opinion that 'the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then indeed is our Constitution a complete *felo de se* [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow... The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." --Thomas Jefferson to Spencer Roane, 1819. ME 15:212

"The judges certainly have more frequent occasion to act on constitutional questions, because the laws of *meum* and *tuum* and of criminal action, forming the great mass of the system of law, constitute their particular department. When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough... The people themselves,... [with] their discretion [informed] by education, [are] the true corrective of abuses of constitutional power." --Thomas Jefferson to William C. Jarvis, 1820. ME 15:278

"There is another opinion entertained by some men of such judgment and information as to lessen my confidence in my own. That is, that the Legislature alone is the exclusive expounder of the sense of the Constitution in every part of it whatever. And they allege in its support that this branch has authority to impeach and punish a member of either of the others acting contrary to its declaration of the sense of the Constitution. It may, indeed, be answered that an act may still be valid although the party is punished for it, right or wrong. However, this opinion which ascribes exclusive exposition to the Legislature merits respect for its safety, there being in the body of the nation a control over them which, if expressed by rejection on the subsequent exercise of their elective franchise, enlists public opinion against their exposition and encourages a judge or executive on a future occasion to adhere to their former opinion. Between these two doctrines, every one has a right to choose, and I know of no third meriting any respect." --Thomas Jefferson to W. H. Torrance, 1815. ME 14:305

"[How] to check these unconstitutional invasions of... rights by the Federal judiciary? Not by impeachment in the first instance, but by a strong protestation of both houses of Congress that such and such doctrines advanced by the Supreme Court are contrary to the Constitution; and if afterwards they relapse into the same heresies, impeach and set the whole adrift. For what was the government divided into three branches, but that each should watch over the others and oppose their usurpations?" -- Thomas Jefferson to Nathaniel Macon, 1821. (*) FE 10:192

Phl 347

Lecture 22: Judicial Supremacy

Marbury v. Madison

- In many ways a strange case. Precipitated by Marshall's own inaction while Secretary of State.
- Issue: can the Supreme Court be asked to issue a "writ of mandamus" requiring an officer (Madison) to fulfill his official duties?
- An act of Congress gave the Court such jurisdiction.

Marshall's Ruling

- Marshall refuses to follow the statute, on the grounds that the Constitution (Article III, section 2) clearly specifies when the Supreme Court is to have original jurisdiction and when it is to have only appellate jurisdiction.
- Marshall held that giving the Court the power to issue writs of mandamus is to give it original jurisdiction in such cases (an arguable point, at best).

Marshall's Opinion

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written... Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of legislature, repugnant to the constitution, is void....

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were law? This would be to overthrow in fact what was established in theory... an absurdity too gross to be insisted on.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the law to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law...

Why otherwise does [the constitution] direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official capacity. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! ...a law repugnant to the constitution is void; and courts, as well as other departments, are bound by that instrument.

Implications of *Marbury*

- The Court "struck down" the law simply by doing nothing -- by refusing to allow Congress to define its own jurisdiction in a way that contradicted the Constitution.
- Marshall did not claim that the Court's opinion was binding on anyone but the Court itself.
- Marshall distinguishes "political questions" from questions involving the rights of individuals.

Judicial Supremacy or Co-equal Branches?

James Madison:

I acknowledge, in the ordinary course of government, that the expositor of the laws and Constitution devolves upon the judicial. But I beg to know upon what principle it can be contended that any one department draws from the constitution greater powers than another in marking out the limits of the powers of the several departments... If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.
[Congressional debate on the national bank]

Abraham Lincoln:

The candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in private actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. (1st Inaugural Address)

Presidential Acts of Constitutional Interpretation

- Almost all early Presidential vetoes were on grounds of unconstitutionality.
- Jackson refused to enforce *Worcester v. Georgia* 31 U.S. 515 (1832).
- Lincoln defied Taney's decision (on the suspension of habeas corpus) in *Ex Parte Merryman* (1861).

Cooper v. Aaron 358 U.S. (1958) 1

The Court argued that its interpretation of the Constitution is binding on all other political actors. Their oaths to uphold the Constitution are oaths to uphold the Supreme Court's interpretation of the Constitution.

Chief Justice Black's Opinion:

"*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the Constitution, and that principle has since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system...

It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Article VI of the Constitution makes it [i.e., the Court's interpretation of the 14th Amendment] binding on the states....Every state legislator and executive and judicial officer is solemnly committed by oath... 'to support this Constitution.' " (p. 18, emphases mine)

City of Boerne v. Flores (1997)

Invalidated the Religious Freedom Restoration Act, which attempted to overturn Smith (1990), by restoring the "compelling state interest" standard to any restriction affecting religious practices. Congress invoked its authority under section 5 of the 14th Amendment "to enforce, by appropriate legislation" the Amendment's guarantees.

J. Kennedy's Opinion

- J. Kennedy (writing for majority) found that the Section 5 enforcement power is merely "remedial" -- Congress is not given the power to decide what substantive rights people have under the 14th Amendment or what actual restrictions that Amendment places on the states.
- Its authority is limited to enacting laws to remedy constitutional violations where the courts have determined they exist.

Stare Decisis and Constitutional Law

Three possible positions:

- Past precedents are final and irrevocable.
- Past precedents have presumptive force that varies from case to case.
- Past precedents should be given no weight in interpreting the Constitution: the Court should consult only the text and historical context.

Factors Affecting the Weight of a Precedent

- Its antiquity
- The margin of majority (unanimous, near-unanimous, closely divided); its partisan or non-partisan character.
- The degree to which the precedent has been accepted by the public and the other branches.
- The degree to which the precedent has been incorporated into statutory law and other Court decisions.

Arguments for Stare Decisis

- Promotes rule of law, by binding the government to definite rules fixed beforehand.
- Promotes fairness, by ensuring that similar cases are treated similarly.
- Promotes efficiency, by limiting relitigation
- If the Court reverses itself, it risks losing the respect and deference of the people and the other branches. Undermines its own prestige & authority

Arguments Against Stare Decisis

- It is the Constitution, and not past Court decisions, which is declared to be the "supreme law of the land" in Article V.
- Stare decisis means that the Court must perpetuate unconstitutional rules, contrary to their oath to support the Constitution.
- Commitment to stare decisis fuels judicial megalomania, leading to more and more extreme claims of judicial supremacy.